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CASE NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1982

WARD W. MILLER,
Trustee in Bankruptcy,
Petitioner

v.

JAMES STEWART LEGARE
HAYNES, SR.,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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I. QUESTION FOR REVIEW

When a man files bankruptcy in 1980, is not his interest in a Navy nondisability enlisted man's pension received since 1971 some form of a present property interest (rather than deriving solely from post- bankruptcy efforts) where:

- the amount received is based upon his pay in the year 1971;
- the present services he must perform are illusory; and
- he will receive the benefits for life under a statutory entitlement defeasible only for cause?

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III. PARTIES TO PROCEEDING

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V. OPINIONS BELOW

The Bankruptcy Court's opinion was not published, and the opinion of the Court of Appeals for the Seventh Circuit appears at 679 F.2d 719. Both are reproduced in the appendix.

VI. JURISDICTION OF THIS COURT

The Seventh Circuit Court of Appeals on June 7, 1982, affirmed on direct appeal a March 6, 1981, order and judgment of the United States Bankruptcy Court, Northern District of Indiana, Fort Wayne Division, denying the Trustee's Application for Turnover. Jurisdiction to review the Seventh Circuit Court of Appeals by Writ of Certiorari is conferred upon the Supreme Court by 28 U.S.C. §1254.

VII. APPLICABLE STATUTES

This case involves the interplay of the 1978 Bankruptcy Code (11 U.S.C. §541) with the provisions of 10 U.S.C. §6330, granting a pension to a retired sailor, and 10 U.S.C. §§6482 and 85, setting forth the few continuing obligations of a retired sailor. These statutes are reproduced in the Appendix.

VIII. STATEMENT OF THE CASE

In 1971, when he was either 35 or 37 years old, Haynes retired from the U.S. Navy with a pay grade E-7 after completing 20 years honorable service. Each month afterward, Haynes received a check from the U.S. Navy, pursuant to 10 U.S.C. §6330, for an amount which equalled one-half of the current pay of an active E-7; at the time he filed bankruptcy this was approximately $610 per month. Haynes has received these monthly payments since 1971, and, absent divestment for cause, will continue to receive them for the rest of his life.

Haynes and wife, then residents of Indiana, filed a joint voluntary bankruptcy petition pursuant to 11 U.S.C. §302, in the United States Bankruptcy Court for the Northern District of

Indiana, Fort Wayne Division on July 11, 1980, listing some $10,978.31 in unsecured debt.

After the first meeting of creditors, the Trustee sought an order from the Bankruptcy Court directing the debtor to turn over to the estate, upon receipt, for the benefit of creditors, the pension proceeds, which he perceived as a pre- sently vested property interest.

On March 6, 1981, the Bankruptcy Court denied the request for turnover, and the Trustee then directly appealed the matter to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1293(b). On June 7, 1982, the Court of Appeals affirmed the Bankruptcy Court on the basis that the proceeds represented current compensation for current services, which would exempt

them from bankruptcy administration under 11 U.S.C. §541(a)(6).

IX. ARGUMENT FOR ALLOWANCE OF WRIT

A. IMPORTANCE

Certiorari should be granted because the Court of Appeals has erroneously decided an important question of federal law in a manner totally in conflict with applicable decisions of this Court from this century.

The question here - the nature of military retirement pay - is an important one to both bankruptcy administration and also to military personnel policies. The very issue here was recently deferred by this Court in McCarty v. McCarty, - U.S. - , 69 L.Ed. 589 at 600, 101 S.Ct. - (1981) and a definitive ruling would clarify much uncertainty in these areas.

B. PROPERTY IN BANKRUPTCY

Under 11 U.S.C. §541(a)(1):

> "all legal or equitable interests of the debtor as of the commencement of the case"

pass to his bankruptcy estate for administration. No longer does it matter if the property is "past-rooted" or "future-rooted:"

> "Section 541(a)(1) has the effect of overruling the Supreme Court's holding in Lockwood v. Exchange Bank [190 U.S. 294, 74 L.Ed 1061, 23 S. Ct. 47 (1903)] in that it includes as property of the estate all property of the debtor including that necessary for a fresh start." (emphasis added)

4 Collier on Bankruptcy (15th Ed.) ¶541.01 at 541-6 and ¶541.06 at 541-26.

> "[O]nce the estate is created, no interests in property of the estate remain in the debtor."

4 Collier on Bankruptcy (15th Ed.) ¶541.06 at 541-27.

If a debtor wishes to retain an asset as exempt from creditors:

> "the debtor, rather than initially withholding property that he claims is exempt, will actually be seeking a return from the estate of the property in question."

3 Collier on Bankruptcy (15th Ed.) ¶522.26 at 522-64. That retention as exempt would require the debtor to find a statutory exemption from execution, for which none exists applicable to Navy retirement pensions.[1]

The property passing to the estate is that in which the debtor has some interest when the bankruptcy was filed.

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[1] Unlike exemptions provided for V.A. administered pensions, those received by Congressional Medal of Honors winners, and numerous other federal retirees:

> "...either through legislative oversight or intentional deletion, Congress has failed to provide that Navy retirement pensions are free from levy and attachment."

In re Nunnally, 506 F.2d 1024 at 1025 (5th Cir. 1975).

Those properties in which he had no beneficial interest are excluded from the estate by 11 U.S.C. §541(b), and those which he only acquires through his subsequent labors do not pass to the estate by 11 U.S.C. §541(a)(6). Nonetheless, a present property interest passes to the estate despite its novelty, contingency, or postponement of enjoyment, Segal v. Rochelle, 382 U.S. 375 at 379, 15 L.Ed. 2d 428, 85 S.Ct. 511 (1966), 4 Collier on Bankruptcy (15th Ed.) ¶541.07[2]. Present property interests also pass to the estate notwithstanding applicable nonbankruptcy prohibitions on alienation, 11 U.S.C. §541(c)(1)(A).

This Court has already held that a retired sailor has an "entitlement" to the continued receipt of his Navy retirement pay, McCarty, supra, 69 L.Ed.2d

at 601,[2] and this Court has repeatedly held that an entitlement to government benefits constitutes a protectable property interest. If it is an entitlement, rather than a mere expectation, the retirement pay would constitute a property interest subjecting the pension to bankruptcy administration along with "all" other properties.[3]

C. ENTITLEMENT

The Court of Appeals held Navy retirement pay compensation for reduced services, rendered after retirement, such that made it an "after-acquired" property, not passing to creditors in bank-

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[2]At footnote 17 the Court concluded: "We hold only that ... Congress intended retirement pay to be a 'personal entitlement.'"

[3]Indeed, by 11 U.S.C. §522(d)(10)(b), an exemption provision not applicable to Haynes as a resident of Indiana when he filed, Congress includes in its enumeration of "property" the debtor's right to receive a "veteran's benefit."

ruptcy by 11 U.S.C. §541(a)(6). The Court of Appeals implicitly rejected the proposition the pension could constitute a presently existing property right under "statutory entitlement" standards recognized by this Court for decades.

Instead, it mistakenly relied upon United States v. Tyler, 105 U.S. 244, 26 L.Ed. 985 (1881) in concluding the pay entirely current compensation for current services. Tyler dealt with a disabled officer in a pension dispute with the Army, and in an age before the recognition of entitlements as vested property interests. In reliance upon Tyler, the Court of Appeals in this case simply avoided the mainstream of 20th century property analysis.

The "entitlement" to the benefit, versus a mere hope or expectation, determines whether the recipient has a

protectable property interest:

> "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." (emphasis added).

Board of Regents v. Roth, 408 U.S. 564 at 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Here, Haynes has more than a unilateral expectation of his monthly pension checks; he has a legitimate claim of entitlement to them, by 10 U.S.C. §6330.

Haynes' retirement pay can be terminated only for cause; for the misconduct provided by 5 U.S.C. §8312 through §8315; his disobedience of a lawful order; or as a result of a conviction

by a military tribunal. This limited defeasibility, however, does not remove the entitlement from legal protection:

> "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in State law, which cannot be removed except for cause. Once this characteristic is found the types of interests protected as property are varied, and, as often as not, intangible, relating to the whole domain of social and economic fact." (emphasis added)

Logan v. Zimmerman Brush Co., -U.S.-, - 71 L.Ed.2d 265 at 275, -S.Ct.- (1982).

This Court has recognized that entitlements conditioned upon continuing service obligations nonetheless constitute protectable property interests, Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970)(AFDC benefits), Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) (Social Security disability benefits).

The sailor, like the Social Security recipient or welfare recipient, has a statutorily created immediate right to payment. His pension, however, can be terminated only for cause, and is intended to normally be paid out for the rest of the retiree's life. AFDC, the cognizable property by Goldberg, supra, is not intended to be of lifetime duration at all; is defeasible upon any number of grounds not amounting to high treason; and subjects its recipient to far more actual present obligations than the retired enlisted man's few theoretical burdens.

The entitlement to the pension recognized by McCarty, supra, makes it a presently cognizable property interest of Haynes notwithstanding some minor future service obligations. Indeed, the Fifth Circuit so concluded by In re

Nunnally, 506 F.2d 1024 at 1025 (5th Cir. 1975).[4] The Seventh Circuit here, however, focusing entirely upon these phantom obligations, completely overlooked the presently protectable nature of Haynes' interest in his continued pension receipts.

D. SERVICES ILLUSORY

The services the Court of Appeals found Haynes obliged to perform were that he might be obligated to two months active duty training every four years if the Secretary of the Navy so ordered, 10 U.S.C. §6485(b); he might be subject to recall to active duty if war or an emergency were declared, 10 U.S.C. §§6482 and 6485(a); and he might be tried for

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[4] Under the prior Act, Nunnally held it to be an inherently exempt property because future-rooted, a distinction no longer viable.

some offense by a military tribunal under the Uniform Code of Military Justice, 10 U.S.C. §802(6).[5]

These current obligations are illusory. There is nothing in the record to suggest that Haynes has, or has not, actually been obligated to attend training camp. If he has been, then the $30,000 he receives every four years for two months camp duty equals an annual rate of compensation of some $180,000, a rate to which no admiral can aspire. That rate is one of unreasonable proportions, particularly where it might be deemed pay for only the possibility of training camp.

While Haynes, as a retired sailor still a member of the Navy, might be

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[5]The burdens imposed upon a retired enlisted man are significantly fewer than those of a retired officer.

punished by a court martial, all he generally need do is avoid conduct which would be equally punishable as criminal in a civilian context. The proposition of actually paying Haynes for his subjection to courts' martial jurisdiction introduces the suggestion that he would lead a life of crime were he not paid to obey the law, and any contract so based would be unenforceable for lack of a valid consideration.

The primary obligation borne by Haynes, as a retired enlisted man, is his possibility of recall to active duty upon declaration of war or national emergency. This obligation is hardly a sword of Damocles unique to Haynes or other retired enlisted men. In the event of mobilization, not only Haynes, but also every civilian citizen not exempted by 50 App. U.S.C. §456, is

subject to conscription for the active military defense of our country. The mere possibility of Haynes' future recall into the active naval service is no more of a present obligation on his part than is the necessity of the average 19 year old male to carry his Selective Service registration card with him. Each bears the potential of a future obligation to serve the country, but neither has any significant present constraints upon his time or liberties deserving of monetary compensation.

Attempting to base Haynes' receipts upon his present activities for the Navy - or to suggest he has any "current services" whatever - simply indulges in the rankest speculation as to the nature of the services and the rate of compensation. Even if he does have <u>some</u> current service obligations, however, the "enti-

tlement" does not cease being a property; the welfare recipient's current burdens are far greater, yet she has a presently vested property interest.[6]

E. DEFERRED COMPENSATION

As a mathematical matter, what Haynes now receives has no real bearing to what, if anything, he is now doing.[7] His retirement pay is an amount equalling one-half of his pay upon the termi-

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[6] In Indiana, at least, the welfare recipient may be required to participate in job training, I.C. §12-1-7-4; obligated to submit to home investigations, I.C. §12-1-7-6; obligated to divulge otherwise confidential medical information, I.C. §12-1-7-14.9(c); obligated to divulge detailed financial information to the Department of Public Welfare, and to continually update that information within 7 days of any change, I.C. §§12-1-7-6 & 7; and obligated to initiate and participate in litigation desired by the D.P.W., I.C. §12-1-7-1.1. With all of these present obligations, far exceeding those of a retired sailor, the AFDC recipient has a presently vested property right in her benefits.

[7] If recalled to active duty, he would be paid commensurately, 10 U.S.C. §1402.

nation of his active duty service in the year 1971.[8] It is related to the past, not the present or future. Haynes earned the pension between 1951 and 1971, and the government saw its primary benefit fulfilled at that time, not now.[9]

Viewed from the government's vantage, the Navy receives no present consideration for what it pays out. It had Haynes' services until 1971 and his retirement at that point; but his future

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[8] 10 U.S.C. §6330(c).

[9] According to the majority opinion in McCarty, 69 L.Ed.2d 589 at 606:

> "...Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet personnel management needs of the active military forces."

The first of these Congressional goals is wholly consistent with retirement pay being a form of deferred compensation for services previously rendered. Of the "personnel management needs" motivating Congress, the ready access to recall of experienced enlisted men in time of war is a goal subordinated to the military's need to simply get older members out of the way. McCarty, supra, 69 L.Ed.2d at 593.

service, in the event of an emergency, comes only at the cost of then putting him back on full pay.

F. ENJOYMENT

In a broad sense, property can be nearly any right of value.

> "The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists of the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land.

1 Bl. Comm. 138; 2 Bl. Comm. 2, 15. Nonetheless, the fluidity of man's relationship with things, others, and his government over the centuries has precluded any fixed definition of "property:"

> "[I]t is impossible to give any categorical definition to the word 'property' nor can we

attach to it in certain relations the limitations which would be attached to it in others."

Fisher v. Cushman, 103 F. 860 at 864 (1st Cir. 1900). According to 63 Am. Jur. 2d "Property" §3:

"Property...is composed of certain constituent elements, namely, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. Of these elements the right of user is the most essential and beneficial. Without it all other elements would be of little effect, since if one is deprived of the use of his property, little but a barren title is left in his hands." (citations omitted)

Here, Haynes has the right, subject only to divestment for cause, to receive the pension checks for the rest of his life. He need only negotiate the checks, something no other person has the authority to do. He may spend them as he pleases, and he has not been salting them away for his old age.[10] Upon reaching a normal retirement age of 65,

since he now has more than a decade of civilian employment behind him, Haynes will also receive Social Security benefits. Unlike the retirement pensions of those veterans whom Congress has exemplified for their bravery or sacrifices, Haynes' pension may be seized or levied upon by his creditors - as may his other properties - to satisfy his obligations. Haynes' dominion to the pension proceeds is complete because paramount to the rights of anyone save the governments', and the proceeds are leviable in a non-bankruptcy context, as are his other property interests.

G. APPORTIONMENT

In dealing with the retirement pay of a commissioned Navy officer (whose

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[10] His pro se response to the rule to show cause with the Court of Appeals indicate he is still employed as a truck driver and has been trying to pay old or current bills with the checks.

constraints are far greater than those upon an enlisted man) this Court has recognized in McCarty, supra, 29 L.Ed.2d at 600, footnote 16, that:

> "...the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that States must tread with caution in this area...."

The other part, of course, to Congress' motivation would have been as deferred compensation for past services. In accord is Hooper v. United States, 326 F.2d 982 (Ct.Cl. 1964) which noted at 987:

> "The salary he received was not solely for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies."

Viewed most charitably to Haynes, the retirement pay could be seen as a mixed breed of deferred compensation

and reduced current compensation. Even so, where both pre-petition and post-petition services are involved:

> "[T]he courts have been adroit in effecting apportionment of compensation for prebankruptcy services when the bankrupt's right did not depend on a post-bankruptcy contingency." (citations omitted)

4A Collier on Bankruptcy, (14th Ed.) ¶70.34 "Wages, Fees, & Commissions" at 450.

For instance, a life insurance salesman's renewal commissions for policies written before bankruptcy, when the debtor has some, usually minor, services to render thereafter, are apportioned between him and the estate, In re Wright, 157 F. 544 (2nd Cir. 1907), as are profits from a joint venture, Hudson v. Wylie, 242 F.2d 425 (9th Cir. 1957), and as are attorney's fees for services rendered both before

and after bankruptcy, Parkford v. Commissioner, 133 F.2d 249 (9th Cir. 1943), cert. den. 319 U.S. 741, 87 L.Ed 1698, 63 S.Ct. 1029.

Even assuming Haynes did have some post-bankruptcy services to render, the Court of Appeals erred in not remanding for an apportionment of the pension proceeds into pre- and post-bankruptcy segments.

H. SUMMARY

Since 1971, Haynes has enjoyed a statutory entitlement, by 10 U.S.C. §6330, to half his former pay grade, which is removable only for cause. Under all of this Court's recent analyses of property interests, Haynes enjoys a presently vested "property" interest, which, in a bankruptcy context, should pass to the estate for the benefit of creditors. "All legal or

equitable interests" in property rights, without exception, pass to the bankruptcy estate under 11 U.S.C. §541(a)(1) In re Smith, 640 F.2d. 880 (7th Cir. 1981), and the Fifth Circuit has already deemed the retirement pay a property interest.

The Court of Appeals for the Seventh Circuit, however, held that Haynes' receipt of these monies constituted current compensation for current services rendered the Navy, and thus did not constitute a vested property interest. In so holding, it ignored this Court's recognition of retired pay as an entitlement; it ignored this Court's equation of entitlement with property; and it strained reason to find current services.

Even if some current services were present, the qualities of property do

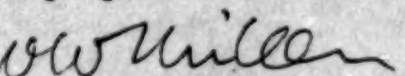
not disappear, and an apportionment between pre- and post-bankruptcy shares would have been appropriate.

The utility of administering the pension in bankruptcy is obvious. In perhaps two or three years, all Haynes' debts would be paid and the pension would then revert back to him, nearly twenty years before normal retirement age. Both competing goals of bankruptcy legislation would be served: Haynes would have achieved the temporary relief from creditor process and a "fresh start," and his creditors would be satisfied.

WHEREFORE, petitioner respectfully prays the Court to grant a Writ of Certiorari to the Court of Appeals for the Seventh Circuit because it erroneously decided an important issue of Federal law in a manner inconsistent

with applicable decisions of this Court, and to direct the parties to fully brief the matter for the Court's consideration.

Ward W. Miller, Trustee in Bankruptcy, Petitioner

By: 
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